478.

JAN 2 1902

CERTIFIED TRANSCRIPT CASES.

Brief of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 2, 1902.

FOK YOUNG YO,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR APPELLANT.

MAXWELL EVARTS,
Counsel for Appellant.

C. H. Reynolds, Walker and Centre Streets, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 478.

FOK YOUNG YO,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLANT.

Statement.

Fok Young Yo, the appellant, is a subject of the Empress of China and a resident of Guatemala, Central America (Record, p. 1). On August 24, 1901, he purchased at Hongkong from the agent of the Toyo Kisen Kaisha Steamship Company his passage from there to San José de Guatemala, and paid therefor one hundred

and eighty-three (Mexican) dollars ($183.00), and received from the agent of said company a ticket for his passage on the steamship "Nippon Maru" from Hongkong to San Francisco, and an order upon the San Francisco agent of said steamship company for a ticket from San Francisco to San José de Guatemala (Record, p. 2).

Upon the arrival of the appellant in San Francisco on September 19, 1901, on board said steamship "Nippon Maru," having in his possession his ticket from Hongkong to San Francisco, and his order for a ticket from San Francisco to San José de Guatemala, he was examined by a customs inspector, and his baggage and private papers were opened and his person searched (Record, p. 2).

After such examination of the appellant by said customs inspector, the Collector of the Port of San Francisco denied to him the privilege of transit through this country (Record, p. 3). This transit, which was refused to the appellant, was merely a transshipment from the said steamship "Nippon Maru" to a ship which should carry him to his destination in Guatemala (Record, p. 2).

The effect of the decision of said Collector

denying to the appellant the right of transit across the dock at San Francisco was equivalent to an order for his deportation to China, and he was detained and imprisoned upon the dock of the Pacific Mail Steamship Company by the agent of the Toyo Kisen Kaisha Company prior to his return to China (Record, p. 1).

The appellant thereupon presented to the United States District Court for the Northern District of California, a petition for a writ of *habeas corpus* addressed to the agent of the Toyo Kisen Kaisha Company, directing him to bring the appellant before said Court.

Upon the return of the writ it was dismissed by the Court, and the appellant remanded to the custody of the agent of the Toyo Kisen Kaisha Company upon the ground that the Court had no jurisdiction to review the decision of the Collector, denying to the appellant the right of transit across this country on his journey to Guatemala (Record, p. 8). From the decree dismissing the writ, this appeal has been taken direct to this Court under the Fifth Section of the Act of Congress, approved the 3d day of March, 1891, and commonly called the Circuit Court of Appeals Act.

Assignments of Error.

The United States District Court for the Northern District of California erred:

FIRST. In holding that it did not have jurisdiction to review the determination of the Collector of the Port of San Francisco, denying to Fok Young Yo the privilege of transit across the United States, in the course of his journey to Guatemala.

SECOND. In holding that the decision of said Collector was final and conclusive upon the courts of the United States, and could only be reviewed upon an appeal to the Secretary of the Treasury.

THIRD. In that it did not hold that Article III. of the treaty between the United States and China of December 8, 1894 (Appendix, p. 12), did not give to the United States the right to prohibit to the appellant the privilege of transit across its territory in the course of his journey to Guatemala.

FOURTH. In that it did not hold that said article of said treaty gave to the United States solely the power to regulate the manner and mode of such transit, in order to prevent said privilege of transit from being abused.

FIFTH. In that it did not hold that "the regulations by the Government of the United States," referred to in Article III. of said treaty, related to a governmental regulation—*i. e.*, a regulation authorized and directed by an Act of Congress.

SIXTH. In holding that Article III. of said treaty authorized the Treasury Department of the United States, without further legislative action, to make such regulations as might be necessary to prevent said privilege of transit from being abused.

SEVENTH. In holding that the first section of the Regulations of the Treasury Department, dated December 8, 1900 (3 Treasury Dec., 1000; Appendix, p. 8), was a valid regulation and authorized by Section 8 of the Act of Congress, approved September 13, 1888 (25 U. S. Stat., 476; Appendix, p. 11), and by Section 7 of the Chinese Exclusion Act, approved May 5, 1892 (27 U. S. Stat., 25; Appendix, p. 12).

EIGHTH. In holding that Section 8 of the Act of Congress, approved September 13, 1888 (25 U. S. Stat., 476; Appendix, p. 11), is now in force and has any application to the privilege of transit given to the appellant by Article III. of said treaty.

NINTH. In holding that Section 7 of the Chinese Exclusion Act of May 5, 1892, relates to the privilege of transit given to the appellant by Article III. of said treaty.

TENTH. In not holding that the privilege of transit given to the appellant by Article III. of said treaty cannot be arbitrarily denied to him by said Collector (if it can be denied at all, which we insist cannot be done), and that any denial thereof must rest upon some reasonable ground for believing that the appellant would abuse said privilege of transit, if granted to him.

ELEVENTH. In not holding that the appellant had complied with every condition required by the Regulations of the Treasury Department.

FIRST POINT.

The treaty between the United States and China of December 8, 1894, does not give to the United States the power to prohibit Chinese laborers from crossing this country in the course of their journeys to or from foreign countries.

We are not concerned here with the abstract question of the power of this country to prohibit Chinamen or any other foreign people from

crossing its territory. We concede at the outset that the United States has inherently such power, but we insist that it has never exercised or attempted to exercise it.

On the contrary, this Government, instead of prohibiting the transit of Chinamen through its territory, has solemnly agreed with the Empire of China that the subjects of the latter country, shall have the privilege of transit through and across the United States, upon their journeys to and from other countries. The United States chose to make this stipulation in the treaty with China rather than to prohibit the transit of Chinamen across its territory, and it made the agreement with the single reservation that it should have the right to make such regulations in regard to the transit it had consented to, as would prevent such privilege of transit from being abused.

This is the only expression by the Government of the United States upon this subject, and the first question of interest is, what is meant by the last part of the second paragraph of Article III. of the treaty, which is as follows:

> "It is also agreed that Chinese laborers shall continue to enjoy the privilege of tran-

> sit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused" (28 U. S. Stat. 1210).

We urge that, in the consideration of this question, the familiar rule applied in the construction of a statute, that the obvious meaning of the words used should be adopted, applies with even greater force to a treaty between two countries. In Bate Refrigerating Company vs. Sulzberger, 157 U. S. 1, it is said in the syllabus: "When the language used in a statute is plain and unambiguous, a refusal to recognize its natural obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of Congress." There is in the case of a treaty the additional element of an agreement between two parties, and certainly, in such case, the words used must be given their plain and obvious meaning, having regard to what was in the minds of the contracting parties, and the meaning and purpose of a treaty is not to be changed by executive action, based upon what is believed should be the proper policy of the United States.

Now, what was in the minds of the two "High Contracting Parties" when this Article III. of the treaty was determined on? We say that this, and this only—viz.: that Chinese laborers should have the privilege of transit across our country, and that the United States should have the right, when a Chinaman had started across this country, in pursuance of the privilege given him by the treaty, to so regulate the transit that he would not abuse the privilege. In other words, the United States Government was authorized by the treaty, to make such regulations as would prevent the Chinaman who had applied at San Francisco for leave to cross the country on his way to the City of Mexico, from changing his mind at Los Angeles, leaving the train there, and remaining in the United States, instead of simply crossing its territory. That is to say, it was the intention of the two "High Contracting Parties" when they entered into and ratified this treaty that the United States should so regulate the mode and manner of the transit that the privilege of transit in each particular case would not be abused and the Chinese Exclusion Acts be evaded, but that the Chinaman would go immediately through to the point of exit from

the United States nearest to his ultimate destination. In order to accomplish this, there are various conditions imposed upon the Chinaman seeking the privilege of transit, and, among other things, before he can go forward the transportation company whose through ticket he holds, is required to furnish to the Collector of Customs a bond in a penal sum of not less than $500, conditioned upon the Chinaman's "continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port" (Appendix, pp. 8 and 9).

The result of this regulation is that the transportation companies giving these bonds, which are most strictly enforced against them by the Government, are compelled, for their own protection, to take the Chinamen through to the port of exit under an armed guard, and no regulation could have been enacted more calculated to prevent the privilege of transit from being abused by the Chinamen. There is no opportunity for its abuse, and the whole burden and responsibility of the matter is thrown upon the transportation company whose through ticket the Chinaman holds.

The two "High Contracting Parties," therefore, had regard in their treaty solely to the regulation of each particular transit for the purpose of guarding against the abuse of the privilege, and seeing to it, that the Chinaman actually went through the United States and departed therefrom. Now, what each particular Chinaman might thereafter do, his transit having been accomplished, did not fall within the scope and purpose of the object which the two Governments had in mind when they drafted and agreed to Article III. of the treaty. So long as the Chinaman went through and out of the United States, then he became subject to the provisions of the Chinese exclusion laws, and was of no concern or interest under the provision of the treaty now in question, until he thereafter might make application for leave to cross again this country on his way back to China.

In other words, the privilege of transit which, it was stipulated in the treaty, should be regulated by the United States to prevent it from being abused was each particular transit across its territory, and, when that transit was completed, the matter which the United States was to regulate was ended, and the power of regu-

lation given by the terms of the treaty was exhausted.

So we insist that the United States has never seen fit to prohibit Chinese laborers from crossing its territory in their journey to and from foreign countries. We further say that the United States has expressly given them, by Article III. of the treaty, this privilege of transit, limiting it and qualifying it in no way whatever, but simply reserving to itself the right to regulate the mode and manner and the conditions under which the transit is to take place. Certainly there is no language in the treaty which, under the ordinary canons of construction, can be said to mean, that the Government has stipulated that it shall have the right, whenever it saw fit, to prohibit Chinese laborers from enjoying the privilege of transit solemnly given them by this Government.

As we said in the beginning of this point, we do not for a moment dispute the right and power of the United States to decree such prohibition; but, until it does by an Act of Congress or by a subsequent treaty between the two countries, the Chinese laborer has an undoubted right under the present treaty to cross the United States on his

journey to other countries, and the exigencies of a supposed necessity, do not empower the executive branch of the Government to usurp the powers and duties of Congress and the General Government, and enact regulations which are so carried out as to result in a prohibition to the Chinaman of the enjoyment of a privilege given to him under an agreement between two great and friendly countries.

In short, the power to regulate the manner of transit does not include the power to prohibit such transit. Prior to the treaty, any Chinaman had the right of transit across the United States, and it is impossible to spell out of the provisions of the treaty, any attempted curtailment or limitation of this right. This stipulation of the treaty is but a declaration and incorporation into the agreement between the two countries of the right and privilege of transit as it stood prior thereto, for the purpose of having a solemn recognition thereof by both countries, and there was no thought for a moment between the two "High Contracting Parties" that the situation then existing was in any way to be changed and altered by the treaty, and a power given to prohibit such transit on the pretext of regulating it.

We therefore submit that the treaty in question gave no power to the Collector of the port of San Francisco to prohibit this appellant from stepping from the steamship which brought him from Hongkong, onto the dock and into a steamship which should take him to his destination in Guatemala, at least fifteen hundred miles distant from the boundaries of the United States, and that the decision of said Collector and of the Court below should be reversed, and the appellant allowed to continue his journey to his home in Guatemala.

SECOND POINT.

There is no regulation by the United States Government enacted in pursuance of the provisions of Article III. of the treaty of December 8, 1894, between the United States and China.

Since the ratification of this treaty, there has been no Act of Congress directing or authorizing the Secretary of the Treasury to make any regulation in regard to the transit of Chinese laborers across the territory of the United States, in the course of their journey to or from other countries.

There are, it is true, certain regulations covering this matter issued by the Secretary of the Treasury, and the last of these was issued on the 8th day of December, 1900, and will be found at page 8 of the appendix.

We insist that these regulations are not governmental regulations, or regulations by the Government of the United States, in the sense in which those words are used in the treaty. A governmental regulation is a regulation authorized by Congress, and the mere rule of an executive officer of the Government, which he is not authorized by Congress to make, does not come within the meaning of the term. In other words, before the regulation of the Secretary of the Treasury, in regard to the transit of Chinese laborers across the territory of the United States, can become a governmental regulation, the Secretary of the Treasury must be authorized and directed to make it, by an Act of Congress.

By the treaty between the United States and China, concluded November 17, 1880, a provision was inserted in Article I. in regard to the coming of Chinese laborers into this country as follows:

> "The Government of China agrees that the Government of the United States may

regulate, limit or suspend such coming or residence."

Was it ever argued that any regulation in pursuance of this provision of the treaty could be made by the Treasury Department without authorization from Congress? Or did the Treasury Department ever enact any regulation except under legislative direction? On the contrary, after the Chinese Immigration Treaty of 1880 was executed, Congress passed the Chinese Exclusion Act of May 6, 1882 (22 U. S. Stat., p. 58), and the very title of it shows that a legislative act is necessary in order to carry out a right given to one Government to regulate matters covered by a Treaty. The Act of May 6, 1882, is entitled "An Act to execute certain treaty stipulations relating to Chinese."

In the opinion of the Attorney-General, dated December 26, 1882 (17 Opin.-Atty. Gen., 483, 484), in speaking of the Exclusion Act of 1882, it was said:

> "There can be no doubt that the Act of Congress now under consideration was intended to carry into effect the stipulation in this Article, that the Government of the United States might suspend the immigration of Chinese laborers to this country."

The force of our claim was recognized by the Government and by the Court below, and in order to meet our argument, it was held by Judge DE HAVEN, in his opinion, that the regulations of the Treasury Department upon the question of transit of Chinamen across this country were authorized by Section 8 of the Act of Congress of September 13, 1888 (25 U. S. Stat., 476). The difficulty with the position taken by the Court is that this Act of Congress of 1888 was passed, subject to the ratification of a then pending treaty between the United States and China. This treaty was never ratified. The act, therefore, never took effect, and certainly not the eighth section thereof, for this refers specifically to certain provisions of the treaty, then pending, but never ratified, which are identical with Article III. of the present treaty, and authorized and empowered the Secretary of the Treasury to make such regulations as he might deem necessary to carry out such provisions of the treaty.

In the case of Li Sing vs. United States, 180 U. S., 486, the Act of Congress of September 13, 1888, was considered, and it was there held that its provisions did not go into effect because the treaty then pending was never ratified.

It is true that the Court limited its opinion to the particular portion of the act then before the Court, but we take it that the ground of the decision is as applicable to the portion of the act now in question as to the part of the act then considered by this Court.

In the case of United States vs. Gee Lee, 50 Fed. Rep., 271, which involved a construction of the Act of September 13, 1888, it was held by the Circuit Court of Appeals for the Ninth Circuit that:

> "This Act having been passed subject to the ratification of a Treaty then pending between the United States and the Emperor of China, which was never ratified, is not in force, except section 13 thereof."

The ruling as to the Act of September 13, 1888, in the case just cited, was followed in United States vs. Loo Way, 68 Fed. Rep., 475.

The present Attorney General seems to have already expressed the opinion that it is doubtful if the Act of September 13, 1888, ever went into effect (Appendix, p. 17).

The only argument which can fairly be deduced from the Act of September 13, 1888, is, that the article of the treaty now in question is not self-executing, for the reason that Article

III. of the treaty pending at the time of the passage of the Act of September 13, 1888 (Appendix, p. 11) was the same as Article III. of the present treaty (Appendix, p. 12), and Section 8 of the Act of September 13, 1888, was passed for the purpose of securing a Governmental regulation to prevent the right of transit from being abused. As, however, the Act of September 13, 1888, never went into effect, because the treaty then pending was never ratified, and as no law has been passed by Congress, directing and authorizing the Secretary of the Treasury to make regulations to prevent the privilege of transit given to Chinamen under Article III. of the present treaty, from being abused, there is, therefore, no Governmental regulation upon this subject, and, until Congress does authorize the Secretary of the Treasury to make regulations upon this question, certainly the right of transit cannot be denied to any Chinese laborer who may apply therefor.

It is difficult to see how Section 7 of the Act of May 5, 1892, can have any application to this case, as said act relates only to the exclusion of Chinese from this country and has nothing whatever to do with their right of transit across the

territory of the United States in the course of their journeys to and from foreign countries, and Section 7 simply authorizes the Secretary of the Treasury to make such regulations as may be necessary for the efficient execution of the act.

THIRD POINT.

Any regulation in pursuance of said treaty seeking to prevent the privilege of transit from being abused should be executed in a reasonable manner and not arbitrarily.

If the Court should not agree with the proposition advanced in the First Point of this brief, that the United States never intended by Article III. of the treaty to prohibit the transit of Chinamen across the United States in the course of their journey to and from foreign countries, and should be of the opinion that the regulations issued by the Secretary of the Treasury were Governmental regulations within the meaning of the treaty and authorized by the 8th section of the Act of 1888, we then come to the question whether such regulation can be executed arbitrarily or whether the Collector must not have some reasonable ground to presume that the

privilege of transit is likely to be abused in the particular case before him.

In the present case the appellant was on his way to his home in Guatemala, in Central America, more than fifteen hundred miles from the boundary of the United States. In the case of Lee Gon Yung, argued with this case, the appellant's destination was the City of Mexico. The only two facts before the Collector were that the two men were Chinamen, and were going to Central America and Mexico. There are over seventy-five similar cases, the disposition of which will be determined by the result of these appeals.

We have, therefore, presented here the extraordinary situation that a Chinese Inspector, a subordinate officer of the Treasury Department, examines at San Francisco each Chinaman who applies for the privilege given to him by a treaty between his country and the United States, and arbitrarily denies to him the privilege if he is on his way to Mexico or Central America. Two facts are enough for the Inspector; viz., that the applicant is a Chinaman and is on his way to Mexico. Therefore, says the Inspector: "I deny him the privilege of transit, because I

think that he may come back again across the border at some future time, and that he does not, therefore, intend to now make a *bona fide* transit across the United States."

The inspector acts upon the suspicion, not that there will be any doubt as to the actual transit of the Chinaman, but that the Chinaman may at some future time return surreptitiously across the border into the United States in violation of the Chinese Exclusion Act and not of this privilege of transit. The right of transit is denied to him, not because there is any probability that it will be abused, but for the reason that there is a possibility that at some uncertain day in the future he may attempt to violate the provisions of the Exclusion Act. The Collector affirms the decision of the Chinese Inspector as a matter of course, and the whole question of granting or refusing the privilege of transit rests with the latter.

If the applicant for the privilege of transit desires to cross the United States on his way to England he is permitted to do so, but if any place in Mexico is his destination the privilege of transit is denied. In other words, the Chinese Inspector interprets the treaty as if it read, "It

is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to every place except Mexico and Central America," and we have the extraordinary spectacle of a treaty between two friendly countries nullified by a subordinate officer of one of them, and with the right of appeal from his decision either to the courts (Record, p. 9) or to the Secretary of the Treasury denied (Appendix, p. 13).

We do not here raise any question as to the advisability of the Government making or not making a further treaty with China and insisting upon a stipulation therein that the privilege of transit across our territory shall not be granted to Chinese laborers journeying to points in Mexico, or of the policy of Congress enacting some law to that effect, but we do say that until some such treaty is ratified, or Act of Congress is passed, the conduct of the Chinese Inspector confirmed by the Collector in refusing the privilege of transit solely upon the ground that the applicant is a Chinaman, and his destination Mexico or Central America, can hardly commend itself to an unprejudiced mind, and can certainly not be upheld upon the ground that the regula-

tion of the Treasury Department commits the whole matter to the Collector, and that, if he is satisfied to deny the privilege of transit, the question is ended, no matter how arbitrary his action may be.

It is true that in the case of Lem Moon Sing vs. The United States, 158 U. S., 538, this Court held that the action of the Collector could not be reviewed by the courts by writ of *habeas corpus*, but the law then under consideration has no application here, and we do not understand that the Government will insist that it has. At least, the Solicitor of the Treasury, in a letter of November 9, 1901, has stated that it has not (Appendix, p. 13). We do not see how the Act of August 18, 1894 (28 U. S. Stat., 390), could be said in any way to refer to the present controversy, as upon its face it relates to aliens "excluded from admission into the United States under any law or treaty now existing or hereafter made." The appellant here is not an alien seeking admission into the United States, and certainly, in his character of applicant for the privilege of transit in pursuance of Article III. of the treaty, is not excluded from the United States by any law or treaty.

It is also true that in the case of Nishimura Ekiu vs. United States, 142 U. S., 651, it was held that the decision of an Immigration Inspector as to the right of an immigrant to land in the United States could not be reviewed by the courts because of the Act of Congress of March 3, 1891 (26 U. S. Stat., 1084), which provided that such decision should be final unless an appeal was taken to the Superintendent of Immigration, whose action was subject to review by the Secretary of the Treasury. The decision in the Nishimura case was, however, placed upon the ground that the Inspector's decision was final by reason of the Statute of 1891, and the inference from the language used by the court is that in the absence of such statute the decision of the Inspector would have been subject to review by the courts. At page 660 of the opinion of Mr. Justice GRAY it is said :

> "An alien immigrant prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. * * * But, on the other hand, the final determination of those facts may be entrusted by

> Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

In the case at bar, however, there is no statute which makes final the decision of the Chinese Inspector or of the Collector denying to a Chinaman the privilege of transit given to him by the treaty, and we venture to say, therefore, that the Act of August, 1894, and the decision in the Lem Moon Sing case, and the Act of March 3, 1891, and the decision in the Nishimura case, have no adverse bearing whatever upon the appellant's case; and we go further and say that in the absence of a statute making the decision of a Collector, denying the right of transit under this treaty, final, his conclusions are open to review by the courts by writ of *habeas corpus* under the authority of the Nishimura case and the Lem Moon Sing case.

Leaving out of sight for a moment the fact that the treaty in question was with China, and

the subject matter was the transit of Chinamen, and considering the question as an abstract proposition, is not the situation somewhat remarkable? Here is an agreement that a certain privilege shall be given to one of the parties and that the right to regulate such privilege shall be reserved by the other. This right of regulation is construed and enforced by the party to whom it is reserved in such a way as to entirely take away the stipulated privilege. This would not be countenanced in any construction of an agreement between private parties, and when you add the fact that the agreement here is between two great and friendly nations, and that the nullifying and making ineffective the agreement is the work of an insignificant and very subordinate officer of one of them, without any supposed right of appeal from his decision, the case becomes almost inexplicable, and can probably only be explained by the hatred of the Chinese in San Francisco, which has warped and perverted the judgment of the subordinate officials of the Chinese Bureau there stationed.

It is all very well for the Chinese Inspector to say: I do not deny the privilege of transit to a Chinaman going to Europe; I only deny the priv-

ilege to Chinamen going to Canada, Mexico, Central America, Cuba and Porto Rico, because I suspect that such journey is made for the purpose of clandestinely returning to the United States. I therefore do not override the treaty or read into it new provisions. But it must be remembered that in the nature of things the only Chinamen who would apply for the privilege of transit would be Chinamen going to contiguous countries. A Chinaman going to England would hardly go via the United States. A Chinaman going to Africa or Patagonia would take some other route.

Of necessity, therefore, the Chinese laborers, in the view of the "High Contracting Parties" at the time the treaty was ratified, were laborers going to Mexico, Canada, Cuba and Central America, as they were the only ones who would seek the privilege of transit across our territory, and a denial of this privilege to such Chinamen simply on account of their destination renders the stipulation in the treaty ineffective and void.

We, therefore, respectfully submit that any regulation of the Secretary of the Treasury, the practical application of which results in a prohibition to Chinese laborers of the right of transit

36201

across our territory, must be executed in a reasonable manner, and the right of transit is not to be prohibited upon general grounds of suspicion resulting from the fact that the applicant is a Chinaman and his destination a town in Mexico or in Central America.

FOURTH POINT.

The appellant has complied with the regulations of the Treasury Department.

I.

The appellant in this case can hardly be said to have made an application to cross the territory of the United States. He simply touched at San Francisco *en route* to Guatemala, and intended only to step from one ship into another (Record, p. 2). He is, therefore, in a somewhat different situation from the appellant in Case No. 482, who sought to cross the territory of the United States on his way to the City of Mexico. The first and only regulation of the Treasury Department which relates to such a case as is now before the Court is the one issued by Secretary McCulloch in a circular dated January 14, 1885 (Syn. Dec. 6722), providing that:

> "Chinese persons who may be compelled to touch at the ports of the United States in

> transit to foreign countries may be permitted to land, under the regulations of January 23, 1883 (Synopsis, 5544), so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination, or the voyage of which may form part of the route necessary to carry them to their destination" (Appendix, p. 5).

This privilege of touching for the purpose of transshipment is shown to have been considered by the Secretary of the Treasury a very different matter from a transit through or across the United States, for in the same circular from which the above quotation has been made are found other regulations governing the transit of Chinese laborers through the United States, in the following words:

> "The regulations contained in decision 5544, and dated January 23, 1883, relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States."

While the regulations as to transit of Chinamen through the United States, above referred to, have been superseded by others thereafter enacted, the provision in regard to Chinamen

who are compelled to touch at a port of this country *en route* to another country have never, so far as we have been able to ascertain, been superseded or repealed. It is true that Secretary Windom in the regulations which were issued by him on September 28, 1889, says, at the end thereof, that "previous regulations on this subject are hereby rescinded," but the subject upon which the Secretary was then making regulations was the subject of the transit of Chinamen through the United States, and not the subject of the right of a Chinaman, compelled to touch at a port of this country *en route* to another country, to be transferred from one ship into another.

We therefore respectfully submit that the regulation of Secretary McCulloch is the only regulation of the Treasury Department applicable to this case. Under this regulation the appellant was entitled to make the transfer from one ship to the other, and there is no treaty, no statute and no regulation which authorized the Chinese Inspector or the Collector at San Francisco to order the appellant to be sent back to China.

II.

The appellant not only has complied with the regulation of Secretary McCulloch, but has also complied with the regulations of the Treasury Department in regard to the transit of Chinamen through the United States. The latest regulation upon this subject is the letter of December 8, 1900, signed by Commissioner Powderly and approved by Secretary Gage (Appendix, p. 8).

The paragraph of this circular of interest here is as follows:

> "I. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said Collector that a *bona fide* transit only is intended, and such ticket and other evidence presented must be so stamped or marked and dated by the said Collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States."

It is to be noticed that all that is required of the applicant as evidence that he intends to make a *bona fide* transit through this country is

> "to produce to the Collector of Customs, at the first port of arrival, a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed."

It is true that the section goes on to say

> "and such other proof as he (or she) may be able to adduce."

This, of course, simply means that, if the applicant can adduce further evidence in addition to or in place of the through ticket (if he should not hold a through ticket), then he should do so. If he exhibits a through ticket but is not able to adduce any further evidence, it is not required of him by the very words of the regulation, so that the circular is certainly entirely complied with, in the case of a Chinaman who is not able to adduce any other proof, if he produces to the Collector a through ticket across the territory of the United States intended to be traversed.

A moment's consideration will show that in nearly every case it would be impossible for a

Chinaman to adduce before the Collector any proof other than his through ticket that he intended to make a *bona fide* transit. In the majority of cases the Chinaman comes to this country with only his ticket and such clothing as he may have, and has nothing whatever to produce outside of this in the way of proof of the *bona fides* of his intention to cross the United States, and it certainly would be unreasonable to require him to produce anything further. He is ignorant of our customs and our ways, and knows nothing of our language. He is simply passing through this country to his destination, and could hardly be expected to have anything about him which would be evidence, one way or the other, as to the character of the transit to be undertaken by him beyond the through ticket which he has bought at Hongkong at considerable expense.

The circular of December 8, 1900 (Appendix, p. 8), amending the circular of Secretary Windom of September 28, 1889 (Appendix, p. 6), is substantially similar in its provisions to the circular of Secretary McCulloch dated January 14, 1885 (Appendix, p. 3), and to the requirements of the regulations of Secretary Folger of Janu-

ary 23, 1883 (Appendix, p. 1), by which it was provided that Chinese laborers seeking the privilege of transit through the United States should obtain a certificate from the Chinese Consul at the port of landing, and, in the absence of such certificate, the following evidence that a *bona fide* transit is intended was required:

> "In the absence of such certificate, other competent evidence to show the identity of the person, and the fact that a *bona fide* transit only is intended, may be received. *The production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the Collector and verified by him.* Such tickets, and all other evidence presented, must be so stamped or marked and dated by the customs officer as to prevent their use a second time."

By this regulation of 1883, the production of a through ticket was "competent proof" that a *bona fide* transit only was intended by the applicant. It was also understood that a man might come to this country without a through ticket, and yet be able to show to the satisfaction of the Collector by other evidence that he intended to make a *bona fide* transit through this country. So this regulation provides for such a case, and

says that a ticket shall be competent evidence, and then speaks of other evidence which the Chinaman may be able to present in case, of course, he has not got a through ticket.

Now, the words "*bona fide* transit" have been in these regulations since 1883, and the substance of the regulations has been the same from 1883 down to the present time, and we insist that, in the present regulation of December 8, 1900, the words "such other proofs as he (or she) may be able to adduce," refer, and are intended to refer, to the case of a Chinaman who for some reason has not a through ticket, and yet may be able to adduce other proof "to satisfy the said Collector that a *bona fide* transit only is intended."

This much is certain. There is nothing in any circular of the Treasury Department on the subject of the transit of Chinamen across the territory of the United States from the first to the last which authorizes the Chinese Inspector at San Francisco to break open the baggage of the applicant, and to subject him to the indignity of a search of his person. The burden is upon the applicant to show that he intends to make a *bona fide* transit of this country. If he fails, then he must return to China. There is, how-

ever, no duty imposed upon, or right given to, the Collector and the Chinese Inspector by the Treasury Regulations to search the person and the baggage of the applicant for leave to cross the territory of the United States. Any evidence procured or developed by such procedure is certainly not adduced by the applicant, which is the only kind referred to in the circular issued by the Secretary of the Treasury.

So we urge upon the Court that, under the very regulations of the Treasury Department now in force, the production of a through ticket across the whole territory of the United States intended to be traversed, and to the foreign destination of the applicant, according to the steamship manifest, is all that is required, and that the appellants in the case at bar and in Case No. 482, argued with this, have complied absolutely with the regulations of the Treasury Department and have done all that it was necessary for them to do thereunder to satisfy the Collector that a *bona fide* transit only was intended. Each bought at great expense a through ticket from Hongkong to their respective destinations. This they had upon their persons, and produced to the Collector. After a full compliance with this regulation,

and a production of the only evidence required thereby, it certainly is an arbitrary exercise of power on the part of the Collector to say that he is not satisfied that a *bona fide* transit was intended by the appellants, and his action should be reversed, and the appellants allowed to proceed upon their journey.

FIFTH POINT.

The United States District Court for the Northern District of California erred in dismissing the writ of habeas corpus for want of jurisdiction.

There is no statute or treaty which makes the decision of the Collector denying to a Chinaman the privilege of transit across the territory of the United States final, and not subject to review by the Courts of the United States.

In the absence of a statute declaring the decision of the Collector final, this Court held, in the case of the United States vs. Jung Ah Lung, 124 U. S., 621, which was an application for a writ of *habeas corpus*, that:

> "The jurisdiction of the Court was not affected by the fact that the Collector had passed on the question of allowing the person to land." (Headnote.)

In the case of Nishimura Ekiu vs. United States, 142 U. S. 651, it was said at page 660:

> "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful. * * * But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted." * * *

In the case of Lem Moon Sing vs. United States, 158 U. S. 538, the Court, through Mr. Justice HARLAN, said at page 549:

> "*If the act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the Courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under existing laws or treaties, and was improperly excluded.* But, when Congress went further

> and declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers 'from admission into the United States under any law or treaty,' such decision should be final, unless, reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers was taken away."

We, therefore, submit with confidence that in the absence of any statute upon the subject the Secretary of the Treasury has not the authority to place the rulings of his subordinates beyond the power of the courts to review, and upon this ground alone the decision of the court below should be reversed.

SIXTH POINT.

The judgment of the United States District Court for the Northern District of California, dismissing the writ of habeas corpus, should be reversed.

MAXWELL EVARTS,
Counsel for Appellant.

APPENDIX TO BRIEF.

INDEX.

	PAGES.
Regulation (5544) of Secretary Folger, dated January 23, 1883	1
Regulation (6722) of Secretary McCulloch, dated January 14, 1885	3
Circular of Secretary Windom, dated September 28, 1889	6
Regulation (22658) of Commissioner-General Powderly, dated December 8, 1900	8
Article III. of the Treaty of 1888, which was never ratified	11
Section 8 of the Act of September 13, 1888	11
Article III. of the Treaty of 1894	12
Section 7 of the Act of May 5, 1892	12
Letter of Acting Solicitor Reeve to the Secretary of the Treasury, dated November 9, 1901	13
Letter of Acting Solicitor Reeve to the Secretary of the Treasury, dated Nov. 12, 1901	14
Extract from letter of the Attorney-General to the Secretary of the Treasury, dated October 10, 1901	17

(5544.)

Chinese Laborers—Transit Through United States.

Treasury Department, January 23, 1883.

The Attorney-General, in an opinion of December 26, 1882, addressed to the Secretary of State, has decided that Chinese laborers, in transit merely across the territory of the United States in the course of their journey to or from other countries, are neither immigrants nor "Chinese coming to the United States as laborers" within the language of the treaty of November 17, 1880, or the Act of May 6, 1882, and, further, that it is not incumbent upon such passengers to produce the certificates of identification prescribed by Sections 4 and 6 of that Act, provided that, by competent proof, they may otherwise establish their transient status

The Department of State has transmitted the opinion of the Attorney-General to this Department with its approbation. Treasury Decision No. 5313, dated July 20, 1882, is therefore revoked, and the following regulations are adopted by this Department to carry into effect the more recent opinion of the Attorney-General and the views of the Department of State:

1. Where a Chinese consul resides at the port of landing or entrance into the United States by any Chinese laborer claiming to be merely in transit through the territory of the United States in the course of a journey to or from other countries, the certificate of such Chinese consul identifying the bearer by name, height, age, &c., so far as practicable, and showing the place and date of his arrival, the place at which he is to leave the United States, the date when his journey is to begin, and that it is to be continuous and direct, shall be accepted as *prima facie* evidence. And such certificate shall be required in all cases where a Chinese consul resides at such port.

2. In the absence of such certificate, other competent evidence to show the identity of the person and the fact that a *bona fide* transit only is intended may be

received. The production of a through ticket across the whole territory of the United States intended to be traversed may be received as competent proof, and should be exhibited to the collector and verified by him. Such tickets and all other evidence presented must be so stamped or marked and dated by the customs officer as to prevent their use a second time.

3. In the case of numbers of Chinese being transported in a body under the charge of agents or others, the affidavit of such agents or others in charge, with proof satisfactory to the collector, that such laborers will be conveyed without delay across the territory of the United States and delivered on board ship or into foreign territory, may be received in lieu of the tickets required in the foregoing regulation.

Descriptive lists of all such Chinese will be prepared in duplicate and presented to the collector of customs substantially in the form mentioned in the circular of May 19, 1882 (Synopsis 5231), and showing, in addition, the place and date of arrival and the place and date of intended departure, and, when practicable, the route to be traveled. One copy will be retained on the files of his office, and one be forwarded by mail to the collector of customs at the port of exit, who will take pains to see that the passengers duly leave the United States. If they do not, he will report the fact to this Department. One list may be made to include all Chinese transported at one time, and each list should be properly dated, signed and sealed by the collector or his deputy.

Where considerable numbers of Chinese intend to travel from the port of entrance to the port of exit under the charge of an agent, as before mentioned, it will be sufficient to have included, in the descriptive list to be mailed to the collector at the port of exit, the number of persons who are to go forward, the name of the agent in charge, and the route by which they are to travel.

CHAS. J. FOLGER,
Secretary.

COLLECTOR OF CUSTOMS AND OTHERS.

(6722.)

CHINESE PERSONS COMING TO THE UNITED STATES.

TREASURY DEPARTMENT, January 14, 1885.

The following regulations relating to the rights of Chinese laborers to enter the United States are deemed to be in accordance with the recent decision of the Supreme Court in the case of Chew Heong, plaintiff in error, vs. The United States, and the existing regulations relating to the admission of Chinese persons other than laborers into the United States are restated and modified for your information and government:

1. Chinese laborers lawfully residing in the United States, and who left the United States by sea after the passage of the Act of July 5, 1884, are entitled to enter the United States only upon the production of the certificate prescribed in Section 4 of that act, or of the certificate prescribed in Section 5 of the Act of May 6, 1882, in case they depart by land.

2. The fourth section of the Act of May 6, 1882, as amended by the Act of July 5, 1884, prescribing the certificate which shall be produced by a Chinese laborer as the only evidence permissible to establish his right of re-entry into the United States, is not applicable to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884, and such persons may be permitted to land without any certificate upon production of evidence satisfactory to the collector of such facts.

3. Chinese laborers residing in this country, at the date of the treaty of November 17, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of the Act of May 6, 1882, and who left the United States before the passage of the Act of July 5, 1884, are entitled to re-enter the United States upon the production of the certificates prescribed by Sections 4 and 5 of the Act of May 6, 1882. Certificates issued under the Act of May 6, 1882, and Decision

6240, before the passage of said Act of 1884, are to be regarded as having the same effect as if said Act of 1884 had not been passed.

4. Chinese persons, other than laborers, coming to the United States for the first time from China, can be permitted to enter the United States only upon the production of the certificate prescribed by Section 6 of the Act of July 5, 1884, such certificate being the sole evidence permissable on the part of the person so producing the same to establish a right of entry into the United States.

5. Chinese subjects, not laborers, desiring to come to the United States from countries other than China, may do so on production of a certificate corresponding to that required by Section 6 of the Act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, if there be one at the port of departure, countersigned by a United States consular officer, or, if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer.

6. Section 6 of the Act of 1884 does not apply to Chinese persons other than laborers lawfully in the United States. Such persons are, by treaty, entitled "to come and go of their own free will and accord," and when they leave the United States are entitled to re-enter on any evidence satisfactory to the collector that they are not Chinese laborers.

For the convenience of such persons and of the customs officers and others, such persons who may desire to depart from and return to the United States may enter the United States on production of a certificate corresponding to that required by Section 6 of the Act of July 5, 1884, to be issued by the collector of customs of the port of departure, which certificate may be *prima facie* evidence of a right to enter the United States.

7. The regulations contained in Decision 5544, and dated January 23, 1883, relative to the transit of Chinese laborers through the territory of the United States, will be applied to all Chinese persons intending to so go in transit through the United States.

8. Chinese persons who may be compelled to touch at the ports of the United States in transit to foreign countries may be permitted to land under the regulations of January 23, 1883 (Synopsis 5544), so far as the same may be applicable, such persons to take passage by the next vessel leaving for their destination or the voyage of which may form part of the route necessary to carry them to their destination.

H. McCULLOCH,
Secretary.

To Officers of the Customs and Others.

CIRCULAR.

TRANSIT OF CHINESE LABORERS THROUGH THE UNITED STATES.

1889.
Department No. 100.
Division of Customs.

Treasury Department,
OFFICE OF THE SECRETARY,

Washington, D. C., September 28, 1889.

To Collectors and other Officers of the Customs:

In view of the opinion of the Attorney-General, promulgated in S. 9519, of July 25, 1889, the following regulations for the transit of Chinese laborers through the United States are hereby prescribed:

1. Any Chinese laborer claiming to be in transit through the territory of the United States, in the course of a journey from and to other countries, shall be required to produce to the Collector of Customs at the first port of arrival a through ticket across the whole territory of the United States intended to be traversed, and such other proof as he may be able to adduce, to satisfy the Collector of the fact that a *bona fide* transit only is intended; and such ticket and other evidence presented must be so stamped, or marked, and dated by the Customs officer as to prevent their use the second time.

2. Descriptive lists of all such Chinese laborers will be prepared in duplicate in the following form:

Descriptive list of Chinese Laborer in transit through the United States.

Name.	Age.	Occupation.	Last place of residence.

Height.		Complexion.	Color of eyes.	Physical marks.
Feet.	*Inches.*			

Port of ——, —— [Date.] [Seal] —— ——,
Collector of Customs.

The Collector shall be satisfied of the correctness of the descriptive list before affixing his signature and seal.

One of the copies will be retained on the files of the office of the Collector of Customs at the port of arrival and one forwarded by mail to the Collector at the port of exit.

3. The Collector of Customs at the first port of arrival shall take a bond in the penal sum of not less than $200 for each Chinese laborer, conditioned for his transit and actual departure from the United States within a reasonable time, not exceeding twenty days from the date of arrival at such port. The bond may be given either by the transportation company issuing the through ticket, or by some responsible person on behalf of the laborer, and will be canceled on receipt from the Collector of Customs at the port of exit of a certificate showing that the person specified in the descriptive list transmitted to such port has actually departed therefrom, and stating the name of the vessel and date of departure.

Previous regulations on this subject are hereby rescinded.

WILLIAM WINDOM,
Secretary.

(22658.)

Regulations governing passage of Chinese in transit through United States.

[Circular No. 163, amendatory of Circular 100, September 28, 1889.]

TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER-GENERAL OF IMMIGRATION,

Washington, D. C., December 8, 1900.

To collectors of customs and all other officers charged with the enforcement of the Chinese exclusion laws:

Complaints having reached the Department of attempted violations of the laws enacted for the exclusion of Chinese by those who have been allowed to pass through the United States to foreign territory, the following rules are hereby adopted for your guidance in granting permission for such transit:

Any Chinese person arriving at your port claiming to be destined to some foreign country and seeking permission to pass through the United States, or any portion thereof, to reach such alleged foreign destination, shall be granted permission for such transit only upon complying with the following conditions:

1. The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a *bona fide* transit only is intended, and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose, as to prevent their use a second time; but no such applicant shall be considered as intending *bona fide* to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States.

2. The applicant in each case, or some responsible person on his (or her) behalf, or the transportation company

whose through ticket he (or she) holds, shall furnish to the said collector of customs a bond in a penal sum of not less than $500, conditioned for applicant's continuous transit through, and actual departure from, the United States within a reasonable time, not exceeding twenty days from the date of arrival at said port.

3. The said applicant shall furnish to the collector of customs at the first port of arrival four photographs of himself, to be taken as directed by said collector, which shall be used in the manner specified in the following rules.

4. The collector of customs shall prepare a descriptive list of such applicants, bound in book form, for file in his office, containing as to each applicant information in the following form, to which one of the photographs mentioned in Rule 3 above shall be permanently attached:

Descriptive list of Chinese persons in transit through the United States.

Name.	Age.	Occupation.	Last place of residence.

Height.		Complexion.	Color of eyes.	Physical marks.
Feet.	Inches.			

PORT OF ——, ——,
——, 190—.

I have made a strict examination for, and noted the physical peculiarities of, ——, whose photograph appears hereon, and am satisfied of his (or her) *bona fide* intention to pass through and out of the United States, and have permitted his (or her) landing under bond, for that purpose.

—— ——,
Collector.

(Photograph, with seal of collector partly covering same, but not to cover any part of face.)

[SEAL.]

5. Two copies of the foregoing description must be prepared by the said collector, on corresponding detached blanks, to each of which a photograph of applicant is permanently attached, sealed as above, one of which is to be kept in the files of the collector's office, or in the office

of the Chinese inspector assigned to said collector, and the other to be forwarded by mail to the collector of customs at the proposed port of exit, to the first-mentioned copy being attached loosely the fourth photograph of those required by Rule 3 above.

6. When the applicant reaches the port of exit he (or she) shall be compared by the collector, or inspector assigned to that duty, with the photograph and description contained in the copy of the descriptive list forwarded from the port of first arrival, and if found to agree therewith shall be allowed to pass through to the foreign country of destination, the officer who makes the comparison indorsing on the said copy the following legend, appropriately filled in:

PORT OF (departure), ——, ——
——, 190–.

I have compared —— —— with a copy of descriptive list forwarded by the collector of customs at ——, and, having no doubt of his (or her) identity, have seen him (or her) depart for —— —— via (proper railroad or steamship line)

—— ——, *Inspector.*

Filed in office of collector of customs at —— ——, 190–.

—— ——, *File Clerk.*

7. Upon receipt of a report from the collector that the applicant has passed through the port of exit, as stated by inspector's return according to the foregoing rule, the collector at the first port of arrival shall cancel the bond given in accordance with Rule 2 above.

T. V. POWDERLY, *Commissioner-General.*

Approved:

L. J. Gage, *Secretary.*

ARTICLE III. OF THE TREATY OF 1888, WHICH WAS NEVER RATIFIED.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States they may produce a certificate from their Government or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused.

SECTION EIGHT OF THE ACT OF SEPTEMBER 13, 1888.

SEC. 8. That the Secretary of the Treasury shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend, such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles.

And he is hereby further authorized and empowered to prescribe the form and substance of certificates to be issued to Chinese laborers under and in pursuance of the provisions of said articles, and prescribe the form of the record of such certificate and of the proceedings for issuing the same, and he may require the deposit, as a part of such record, of the photograph of the party to whom any such certificate shall be issued. (25 U. S. Stat. 476.)

ARTICLE III. OF THE TREATY OF DECEMBER 8, 1894.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided, viséd by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused (28 U. S. Stat. 1210).

SECTION SEVEN OF THE ACT OF MAY FIFTH, 1892.

SEC. 7. That immediately after the passage of this act the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants.

Such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application (27 U. S. Stat. 25).

DEPARTMENT OF JUSTICE,

OFFICE OF THE SOLICITOR OF THE TREASURY.

WASHINGTON, D. C., November 9, 1901.

The Secretary of the Treasury:

SIR:

My opinion has been verbally requested by Assistant Secretary Taylor upon the question whether a Chinese laborer who has been denied the privilege of transit through this country is entitled to an appeal to the Secretary of the Treasury.

I have to advise you that I do not think that the right of appeal exists in such a case; first, because I think that the Act of August 18, 1894, providing that the decision of the immigration officers excluding an alien from admission to this country shall be final, unless reversed on appeal to the Secretary of the Treasury, does not apply to Chinese who are merely seeking transit through this country; and, secondly, because the regulation made by the Secretary of the Treasury, that the Collector shall be satisfied of the good faith of the applicant for a transit permit, makes the decision of the Collector in such a case final.

The brief filed by counsel for the applicants is herewith returned.

Very respectfully,

(Sgd.) F. A. REEVE,
Acting Solicitor.

DEPARTMENT OF JUSTICE.

OFFICE OF THE SOLICITOR OF THE TREASURY.

WASHINGTON, D. C., November 12, 1901.

DICTATED BY F. A. R.,
68, 1899.

To the Secretary of the Treasury,

SIR:

In compliance with your verbal request I have further considered the question of the right of appeal to the Secretary of the Treasury from the decision of the Collector denying to an alien Chinaman the privilege of transit across the territory of the United States.

Since my consideration of the question on last Saturday I have heard reargument on somewhat different lines. Mr. Evarts, of counsel for the Chinese, contends with apparent sincerity that free transit across the territory of the United States is a right vouchsafed by the convention of 1894, and cannot be taken away by departmental regulation. In other words, that the power vested in the Government to regulate, relates only to the mode and conditions of the transit, and does not give the Secretary of the Treasury any power to inquire into the intention of the applicant, or prohibit his landing even if satisfied that the Chinaman's object is to evade the purpose of the treaty and remain in the United States. This contention is not worthy of serious consideration. The parties to the convention must have contemplated the right of transit for only such Chinese laborers who in good faith sought the privilege of crossing our country. When there is good reason to doubt his *bona fide* intention, the Government, acting through the proper executive officer, would have the clear right to prevent the intended fraud. The authority to regulate the transit necessarily includes the power to prohibit the landing.

I have already advised you that, in my opinion, the Act of 1894 does not relate to Chinese in transit, but to

aliens who seek to enter and remain in the United States. My attention has been called to a recent decision of Judge DeHaven, who suggests that, while this class of Chinamen are not entitled to the writ of *habeas corpus*, they have a remedy by appeal to the Secretary if they are denied landing by the Collector. The question of the right of appeal was not before the Court, and his remark may be taken as merely *obiter dicta*, and not authoritative. Besides, it is but just to the learned judge to assume that the opinion to which my attention has been called (*In re* Fok Young Yo) has not been reported with the accuracy which should characterize the report of a decision of the Court. For instance, Judge DeHaven more than once, inadvertently of course, locates Guatemala in the Republic of Mexico; and quite as carelessly he is made to remark that the regulation of the Treasury Department relating to Chinese in transit, etc., is authorized by the Acts of 1888 (25 St., p. 476) and 1892 (27 St., p. 25). The first act prohibits the coming of Chinese laborers to the United States, and the second act prohibits the coming of Chinese persons to this country, and has no relation to Chinese passing in transit. The power of the Secretary to make the regulation referred to is given by Art. III. of the treaty of 1894 in the following words:

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused."

Prior to this treaty, and I believe without any treaty or express statutory authority, the Secretary of the Treasury had the authority to make regulations concerning the transit of Chinese. The Attorney-General held in 1882 that the Secretary of the Treasury had authority to make regulations concerning the transit of Chinese across the country (17 Op., 485; see, also, 18 *Id.*, 368; 19 *Id.*, 369; 20 *Id.*, 693).

While the language of the said Act of 1894 is com-

prehensive, yet I do not believe it was intended to embrace the class of Chinese who seek the privilege of transit across the country, but relates to aliens who have been excluded from admission to the United States, and not to Chinese laborers who desire to "continue to enjoy the privilege of transit across the territory of the United States," subject to such regulations as the Government may prescribe. And I must repeat that in my opinion the right of appeal from the decision of the Collector denying the landing of Chinamen who claim to be in transit is not given by the Act of 1894. Appeals in such cases may be provided for by the Secretary under the power given by the treaty, if he should see fit to exercise it.

The papers submitted are herewith returned.

Very respectfully,

(Sgd.) F. A. REEVE,

Acting Solicitor.

EXTRACT FROM LETTER OF ATTORNEY-GENERAL TO THE SECRETARY OF THE TREASURY DATED OCTOBER 10, 1901 (TREAS. DEC. 23,304).

The act of September 13, 1888, was passed with reference to a treaty between the United States and China then pending, which was never ratified. It has always been doubtful whether any part of this act took effect. Section 1 made it unlawful, after the ratification of that treaty, for any Chinese person to enter the United States "except as hereinafter provided." That would seem to make the entire act dependent upon the treaty. Section 15 obviously was never operative, because it expressly imposed the condition of ratification. The Federal courts in various districts have for the most part held that sections 2–4 and section 15 have no field of operation, but that other parts of the act, especially sections 12 and 13, are in force. And it must be conceded that hitherto the right of appeal of Chinamen from judgments of deportation, under section 13, has been recognized by the courts and not resisted by the Government. Notes to the Treasury Digest of the Chinese Exclusion Laws, 1889, page 15, note 1, and 2 Supplement Revised Statutes, page 141, note 1, state the uncertainty on the subject and cite the decisions. The latter note shows that the formal attitude of the Treasury Department has been that the act of September 13, 1888, was "dependent upon the ratification of the then pending treaty with China, which treaty was not ratified."

The Supreme Court in the case of Wong Wing *v.* United States (163 U. S., 228) mentioned a section of the act of 1888, without discussing or passing upon the validity of that act, as dependent upon the treaty. In the case of Li Sing *v.* United States (180 U. S., 486, 488, 490), the court says:

"But the act of September 13, 1888, was passed to take effect upon the ratification of a treaty then pending between the United States and the Emperor of China, and it is conceded that such treaty never was ratified.

* * * Without finding it necessary to say that there are no provisions in the act of September 13, 1888, which from their nature are binding on the courts as existing statements of the legislative will, we are ready to hold that section 12 of that act can not be so regarded."

I do not undertake now to say that there are no portions of the act which are not in force, but the current doubt whether it is at all operative has an important bearing upon the present inquiry. For the language of section 7, the act of 1888 is followed so substantially in article 2 of the treaty of 1894, and yet with such express variation as to the feature before us, that we are impelled to conclude that Congress deliberated upon the very point, and clearly determined it by establishing that variation instead of the rule of the act. I therefore hold that Article II. of the treaty has thus far replaced and abrogates section 7 of the act, and I so answer your question.